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ZAINA ABIDIN HAMID & ORS

v.

KERAJAAN MALAYSIA & ORS

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KN SEGARA JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: B-01-90-04]

C

25 JUNE 2009

D ***CIVIL PROCEDURE:*** *Originating summons - Striking out - Constitutionality of legislation enacted by Parliament and State Legislative Assembly, interpretation of - Jurisdiction of civil courts - Abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(d) - Federal Constitution, art. 121(1A)*

E ***CIVIL PROCEDURE:*** *Striking out - Abuse of process of court - Originating summons - Constitutionality of legislation enacted by Parliament and State Legislative Assembly, interpretation of - Jurisdiction of civil courts - Rules of the High Court 1980, O. 18 r. 19(1)(d) - Federal Constitution, art. 121(1A)*

F ***CONSTITUTIONAL LAW:*** *Courts - Jurisdiction - Civil courts - Striking out of originating summons - Constitutionality of legislation enacted by Parliament and State Legislative Assembly, interpretation of - Abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(d) - Federal Constitution, art. 121(1A)*

G ***CONSTITUTIONAL LAW:*** *Jurisdiction - Civil court - Striking out of originating summons - Constitutionality of legislation enacted by Parliament and State Legislative Assembly, interpretation of - Abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(d) - Federal Constitution, art. 121(1A)*

H ***CONSITUTIONAL LAW:*** *Legislation - Constitutionality of - Striking out of originating summons - Interpretation of legislation enacted by Parliament and State Legislative Assembly - Jurisdiction of civil courts - Abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(d) - Federal Constitution, art. 121(1A)*

I

CONSTITUTIONAL LAW: *Legislature - Constitutionality of statute - Striking out of originating summons - Interpretation of legislation enacted by Parliament and State Legislative Assembly - Jurisdiction of civil courts - Abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(d) - Federal Constitution, art. 121(1A)*

This was an appeal by the appellants/plaintiffs against the decision of the High Court striking out their originating summons ('OS') on the ground that it was an abuse of the process of the court under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 ('RHC'). The only issue requiring determination was whether the plaintiffs' filing of the OS, to seek the assistance of the High Court in relation to the declarations prayed for in the OS, constituted an abuse of the court's process so as to warrant the OS to be struck out.

Held (allowing the plaintiffs' appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) It was abundantly clear that the declarations sought by the plaintiffs in the OS revolved around the interpretation concerning the constitutionality of legislation enacted by Parliament and the State Legislative Assembly of Selangor Darul Ehsan. While art. 121(1A) of the Federal Constitution ('FC') has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Court, it has not taken away the jurisdiction of the civil courts to interpret written laws of the State enacted for the administration of Muslim law. The civil courts are entrusted with the responsibility of determining the issue of constitutionality of legislation. *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* (foll); *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* (foll); *Latifah Mat Zin v. Rosmawati Sharibun & Anor* (foll); *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners)* (foll). (para 11)

(2) In seeking to summarily strike out the OS on grounds of abuse of process under O. 18 r. 19(1)(d) of the RHC, the first, second and third defendants must satisfy the test of proving that the OS was obviously unsustainable. Since the plaintiffs were actually seeking recourse by requesting the civil courts to interpret the constitutionality of written laws enacted in

Parliament and the State Legislative Assembly, this certainly could not constitute an abuse of process. Hence, the OS was not obviously unsustainable and must be heard and determined on its merits. *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* (foll); *Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman & Ors* (foll). (paras 18, 19 & 20)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu-perayu/plaintif-plaintif terhadap keputusan Mahkamah Tinggi menolak saman pemula mereka ('SP') atas alasan bahawa ia merupakan sesuatu penyalahgunaan proses mahkamah di bawah A. 18 k. 19(1)(d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Isu tunggal yang perlu dipertimbangkan ialah sama ada pemfailan SP oleh plaintif-plaintif, untuk menuntut bantuan Mahkamah Tinggi berhubung dengan deklarasi-deklarasi yang dituntut dalam SP, merupakan sesuatu penyalahgunaan proses mahkamah yang mewajarkan SP dibatalkan.

Diputuskan (membenarkan rayuan plaintif-plaintif)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Ia adalah amat jelas bahawa deklarasi-deklarasi yang dituntut oleh plaintif-plaintif dalam SP berkisar pada tafsiran mengenai keperlembagaan perundangan yang diperbuat oleh Parlimen dan Dewan Undangan Negeri Selangor Darul Ehsan. Walaupun Perkara 121(1A) Perlembagaan Persekutuan ('PP') telah merampas bidang kuasa mahkamah-mahkamah sivil berhubung dengan perkara-perkara yang termasuk dalam bidang kuasa Mahkamah Syariah, ia tidak merampas bidang kuasa mahkamah-mahkamah sivil untuk mentafsirkan undang-undang bertulis Negeri yang diperbuat untuk pentadbiran undang-undang Islam. Mahkamah-mahkamah sivil diberi tanggungjawab untuk menentukan isu keperlembagaan perundangan. *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* (diikuti); *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* (diikuti); *Latifah Mat Zin v. Rosmawati Sharibun & Anor* (diikuti); *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Interveners)* (diikuti).

(2) Dalam menuntut untuk membatalkan secara terus SP atas alasan penyalahgunaan proses di bawah A. 18 k. 19(1)(d) KMT, defendan-defendan pertama, kedua dan ketiga mesti memenuhi ujian yang membuktikan bahawa SP jelasnya tidak boleh dibenarkan. Oleh kerana plaintif-plaintif sememangnya menuntut pertolongan dengan meminta mahkamah-mahkamah sivil mentafsirkan keperlembagaan undang-undang bertulis yang diperbuat oleh Parlimen dan Dewan Undangan Negeri, ini dengan nyatanya tidak boleh menjadi suatu penyalahgunaan proses. Oleh itu, SP bukannya jelas tidak boleh dibenarkan dan mesti didengar dan ditentukan atas merit-meritnya. *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* (diikuti); *Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman & Ors* (diikuti).

[Diperintah sedemikian.]

Case(s) referrred to:

Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Intervener) [2008] 4 CLJ 309 FC ***(refd)***

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 1 LNS 26 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(foll)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(foll)***

Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin [1988] 1 SLR 374 ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman & Ors [1996] 3 CLJ 695 HC ***(foll)***

Grainger v. Hill [1838] 4 Bing NC 212 ***(refd)***

Hadi Hassan v. Suria Records Sdn Bhd & Ors [2004] 8 CLJ 225 ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Johnson v. Gore Wood & Co (A Firm) [2002] 2 AC 1 ***(refd)***

Lai Kim Loi v. Dato' Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(foll)***

Manson v. Vooght [1999] BPIR 376 CA ***(refd)***

Mohamad Ghazali Shuib & Ors v. Amalan Tepat Sdn Bhd & Anor [2008] 1 CLJ 714 HC ***(refd)***

Penang Port Commission v. Kanawagi Seperumaniam [2009] 1 CLJ 169 CA ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

A *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah [1999] 2 CLJ 5 FC* ***(foll)***
Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1998] 1 CLJ 960 CA ***(refd)***

Legislation referred to:
B Administration of Islamic Law Enactment 1989 (Selangor), s. 2
Courts of Judicature Act 1964, s. 14
Federal Constitution, arts. 11(1), 121(1A), 160
National Registration Regulations 1990, regs. 5, 14
Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19(1)(d), (3),
C O. 92 r. 4

Rules of Court [Sing], O. 18 r. 19(1)(d)

Other source(s) referred to:
Malaysian Court Practice, MLJ 2007 Desk Edition, p 247, para 18.19.7

D *For the appellant - Fahri Azzat (K Shanmuga with him); M/s Kanesalingam & Co*
For the 1st respondent - Hjh Azizah Nawawi SFC
For the 2nd respondent - Datin Paduka Zauyah Be Loth Khan (Md Azhari Abu Hanit with him); State Legal Advisor
E *For the 3rd respondent - Siti Rahimah Khalil; M/s Aishah Kama & Sabri*
For the 4th respondent - Edmund Bon Tai Soon; M/s Chan Yat Hee & Assoc

[Appeal from High Court, Shah Alam; Originating Summons No: 21-31-2002 (MT4)]

F *Reported by Suresh Nathan*

JUDGMENT

G **Low Hop Bing JCA:**

Appeal

[1] This appeal is lodged by the appellants ("the plaintiffs") against the decision of the Shah Alam High Court in striking out
H the plaintiffs' originating summons ("the OS").

[2] For brevity and convenience, a reference hereinafter to an order and a rule, and to an article, is a reference respectively to that order and rule in the Rules of the High Court 1980, and the
I article in the Federal Constitution.

Prayers For Declaration

[3] Pursuant to O. 18 r. 19, O. 15 r. 16 and O. 92 r. 4, the OS seeks the following declarations:

(1) An interpretation that the words "his religion" in art. 11(1) means the religion which a person chooses to profess and practise as his religion (para 1 of the OS) and the phrase "person(s) professing the religion of Islam" in various provisions of the Federal Constitution are to be interpreted to mean "a person who acknowledges himself to be a believer of the religion of Islam" (para 2);

(2) The definition of a person as a 'Muslim' in s. 2 of the Administration of Islamic Law Enactment 1989 (Selangor) is null and void (para 3);

(3) Any requirement that the plaintiffs should obtain permission from the Syariah Court before Islamic law ceases to apply to them be considered null and void (para 4);

(4) The plaintiffs are no longer Muslims (para 5);

(5) The first plaintiff has the right to determine the religion of his children (who are the other plaintiffs herein) (para 6);

(6) Any arrest and/or detention of the plaintiffs by the second defendant pursuant to State Islamic law (para 7) and the issuance of threat or issuance of any document that requires the plaintiffs to do or omit to do any act is contrary to law (para 8);

(7) Any treatment of the plaintiffs as Muslims (para 9) and any compulsion on the plaintiffs to undergo acts which relate to Islam are contrary to law (para 10);

(8) Regulations 5 and 14, and the Schedule to the National Registration Regulations 1990 are inconsistent with the Federal Constitution (para 11);

(9) The plaintiffs shall in all respects of public and private life be recognized by their new names (para 12) and as being Hindus (para 13);

(10) The first defendant shall cause the educational institutions, in which the second to fourth plaintiffs were enrolled, not to compel or require them to undergo any instruction in Islam (para 14); and

(11) The plaintiffs are not to be considered as Malays within the meaning of art. 160 (para 15).

Factual Background

[4] The first plaintiff is a Malaysian of Indian origin, born of parents who are also Malaysians of Indian origin but are shown in their identity documents as Muslims. The first plaintiff says that throughout his formative years, his parents followed a Hindu way of life and brought him up as a Hindu.

[5] The first plaintiff by a deed poll dated 16 March 1973 (Gazette G.N. No. 1686 of 1973 dated 24 May 1973) adopted a new Hindu name.

[6] The first plaintiff is the natural and lawful father of the second to fourth plaintiffs who, at the time the OS was filed, were all under the age of majority. The marriage of the first plaintiff to his Hindu wife, ie the mother of the second to fourth plaintiffs, was registered under the Law Reform (Marriage and Divorce) Act 1976.

Abuse Of Process

[7] The first to third defendants *viz* the Government of Malaysia through learned senior federal counsel Hajah Azizah Hj. Nawawi, the Government of Selangor Darul Ehsan through learned legal adviser Datin Paduka Zauyah Be binti Loth Khan (assisted by Mr Md Azhari bin Abu Hanit); and the Majlis Agama Islam Selangor through learned counsel Ms Siti Rahimah Kalil collectively contended that the plaintiffs' filing of the OS constitutes an abuse of the process of the Court under O. 18 r. 19(1)(d).

[8] It was argued by learned counsel Mr Edmund Bon Tai Soon for the fourth defendant; and Mr Fahri Azzat (Mr K Shanmuga with him) for the plaintiffs that the OS is not an abuse of process as the plaintiffs are asking the High Court to declare certain statutes unconstitutional.

[9] The collective contention presented for the first to third defendants was sustained by the High Court, as a result of which the OS was struck out.

[10] In our view, the question raised for consideration by this court may be formulated as follows:

> Does the plaintiffs' filing of the OS, to seek the assistance of the High Court in relation to the declarations prayed for in the OS, constitute an abuse of the process of the Court so as to warrant the OS to be struck out?

[11] It is abundantly clear to us that the declarations sought by the plaintiffs in the OS revolve around the interpretation concerning the constitutionality of legislation enacted by Parliament and the State Legislative Assembly of Selangor Darul Ehsan. While art. 121(1A), effective from 10 June 1988, has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts, it does not take away the jurisdiction of the civil courts to interpret written laws of the State enacted for the administration of Muslim law: per Hashim Yeop A Sani CJ (M) (as he then was) in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah, Balai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC. Our civil courts are entrusted with the responsibility of determining the issue of constitutionality of legislation: per Dzaiddin SCJ (later CJ (Malaysia)) in *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5 FC. Interpretation of the Federal Constitution *vis-à-vis* other written laws is a matter for the civil courts: per Abdul Hamid Mohamad FCJ (later CJ (Malaysia)) in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253 FC at 288 para [76], and also in *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners)* [2008] 4 CLJ 309 FC.

[12] The concept of abuse of process relied on by the first to third defendants deserves to be put in proper perspective.

[13] In civil litigation, abuse of process constitutes a ground empowering the court, at any stage of the proceedings, to strike out or amend any pleading or endorsement of any writ in the action under O. 18 r. 19(1)(d), or under the court's inherent jurisdiction housed in O. 92 r. 4: see *Malaysian Court Practice* MLJ 2007 Desk Edition at p. 247 para 18.19.7. Under O. 18 r. 19(3),

A the OS is treated as if it were a pleading for the purposes of O. 18 r. 19(1). The court has an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 SC.

B

[14] The term "an abuse of the process of the court" under O. 18 r. 19(1)(d) (Singapore), which is in *pari materia* with our O. 18 r. 19(1)(d), has been given a wide interpretation by the courts and includes considerations of public policy and the C interests of justice. It signifies that the process of the court must be used *bona fide* and properly and must not be abused: *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1988] 1 SLR 374 at p 384, CA Singapore.

D **[15]** In *Johnson v. Gore Wood & Co (A Firm)* [2002] 2 AC 1 HL, at p. 29, Lord Bingham of Cornhill referred to *Manson v. Vooght* [1999] BPIR 376 CA 388-389, where May LJ lamented, *inter alia*, that "Abuse of process is a concept that defies precise definition in the abstract."

E **[16]** The categories of abuse of process are never closed and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case: *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651 CA.

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[17] Illustrations of abuse of process include the following:

(1) The plaintiff knowing that he never had a cause of action in the first place, and yet proceeded with his action in order to G extort a relief he was never entitled to: *Grainger v. Hill* [1838] 4 Bing NC 212: p. 271B-C;

(2) Multiplicity of actions: *Lai Kim Loi v. Dato' Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61, SC;

H (3) Where the court has held that there was a triable issue in the plaintiff's writ action, the subsequent filing of an originating summons by the same plaintiff, thereby obtaining summary judgment on the originating summons based on affidavits only, in the absence of a trial: *Penang Port Commission v. Kanawagi* I *Seperumaniam* [2009] 1 CLJ 169 CA;

(4) Resorting to a process with an intention to embarrass the defendant: *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 1 LNS 26;

(5) Where the process of the court has not been used in a *bone fide* manner and has been abused: *Hadi bin Hassan v. Suria Records Sdn Bhd & Ors* [2004] 8 CLJ 225; and

(6) Commencing an action against a judge of the High Court contrary to the judicial immunity expressly conferred on the judge under s. 14 of the Courts of Judicature Act 1964: *Indah Desa Saujana Corp Sdn Bhd, supra.*

[18] With specific reference to the instant appeal, in seeking to summarily strike out the OS on grounds of abuse of process under O. 18 r. 19(1)(d), the first, second and third defendants must satisfy the test of proving that the OS is obviously unsustainable. The governing principles are trite. The *locus classicus* is to be found in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC where the then Supreme Court speaking through Mohamed Dzaiddin SCJ (later CJ Malaysia) explained, in essence, as follows:

(1) It is only in plain and obvious cases that recourse should be had to the summary process under this rule and summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it "obviously unsustainable"; and

(2) So long as the pleading discloses some cause of action or raises some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleading to be struck out.

(See also: *Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1998] 1 CLJ 960, CA; and *Mohamad Ghazali Shuib & Ors v. Amalan Tepat Sdn Bhd & Anor* [2008] 1 CLJ 714 HC).

[19] Where a litigant brings an action to protect his rights, the use of remedies afforded to him by the law cannot be an abuse of the court's process: *Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman & Ors* [1996] 3 CLJ 695 HC per Mahadev Shankar J (later JCA).

[20] A substantially similar situation arises in the instant appeal. Here, the plaintiffs are actually seeking recourse by requesting the civil courts to interpret the constitutionality of written laws enacted in Parliament and the State Legislative Assembly. This certainly cannot constitute an abuse of process. Hence, the OS is not obviously unsustainable. It must be heard and determined on merits.

Conclusion

[21] The answer to the above question is in the negative. The learned judicial commissioner has erred in striking out the OS. The plaintiffs' appeal is allowed. The order of the High Court is set aside. The OS is reinstated and remitted to the High Court for hearing on merits. It is now fixed for mention in the Shah Alam High Court on Monday 29 June 2009. Costs of RM3,000 here and in the court below to be jointly paid by the first, second and third defendants to the plaintiffs. Deposit to be refunded to the plaintiffs.